



May 8, 2020

EEOC Provides Guidance on Returning Vulnerable Employees to the Workplace

On May 5, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued technical guidance addressing accommodations for the return to work of employees with underlying medical conditions, through responses to three frequently asked questions. On the same day, the EEOC withdrew its guidance on one of those questions which concerned accommodation of these employees under the “direct threat to self” analysis, explaining that the information was “misinterpreted” in press reports and social media. On May 7, 2020, the EEOC re-issued its guidance on accommodations for employees with underlying medical conditions.

First, the EEOC clarified that it is the employee’s responsibility to request a reasonable accommodation. If the employee does not make a request, the ADA does not mandate that the employer take any action. The request may be verbal or written, and need not use the term “reasonable accommodation.” However, the employee must communicate that he or she has an underlying medical condition that requires a change to meet the medical need. The employer may then ask questions or seek medical documentation to decide if the employee has a disability and if there is a reasonable accommodation that can be provided without undue hardship.

Second, the re-issued guidance provides that an employer who knows that an employee has an underlying medical condition that may place him or her at “higher risk for severe illness” from COVID-19 cannot exclude that employee from the workplace, unless the employee’s disability poses a “direct threat” to his or her health that cannot be eliminated or reduced by reasonable accommodation. The EEOC outlined steps employers must follow before reaching this conclusion.

In order to determine whether an employee poses a direct threat to himself or herself in the workplace, an employer must make an individualized assessment of the employee's disability, taking into consideration the duration of risk, nature and severity of potential harm, the likelihood that harm will occur, imminence of potential harm, the severity of the pandemic in the particular area, and the employee's job duties, likelihood of exposure to the COVID-19 virus at the worksite, and protective measures taken by the employer, including mandatory social distancing.

Next, even if the employee meets the direct threat to self test, the employer cannot exclude the employee from returning to the workplace, or take any other adverse action, unless no reasonable accommodation can be provided to eliminate or reduce the risk, absent undue hardship. The employer must engage in the interactive process and must consider accommodations such as telework, leave, or reassignment. An employee may only be excluded from the workplace if, after completing these steps, the facts support the conclusion that the employee poses a direct threat to himself or herself that cannot be reduced or eliminated by reasonable accommodation.

The third guidance issued by the EEOC provides examples of accommodations, absent undue hardship, that may eliminate or reduce a direct threat to self. They include providing enhanced protective gowns, masks, gloves and other personal protective equipment, erecting a barrier that separates the employee from others, removing marginal functions, temporarily modifying work schedules, or moving the location of the employee's work. These are not exhaustive, and the EEOC encourages employees and employers to be creative and flexible.

Takeaway For Employers

As employers begin the process of reopening their businesses, they should be implementing strategies to mitigate the risk of infection in the workplace. However, some employees may have underlying medical conditions that place them at higher risk for severe illness if infected with the COVID-19 virus. Employers should address those situations on an individualized basis and engage in the interactive process to determine whether accommodations can be provided to eliminate or reduce the risk.

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If you have any questions regarding this alert, please do not hesitate to contact us.

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